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No. 07-1522

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In The
Supreme Court of the United States

JUDITH CLARK,

Petitioner,

v.

ADA PEREZ, Superintendant, Bedford Hills Correctional Facility, ANDREW CUOMO, Attorney General, State of New York,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

In accordance with the provisions of Supreme Court Rule 16(8), Petitioner Judith Clark hereby submits this Supplemental Brief in support of her previously filed Petition for Certiorari.

I. INTRODUCTION

Since the filing of the writ of certiorari on June 5, 2008, the Second Circuit has decided an additional case (on July 8, 2008) that bears directly on the issues presented in the original Petition in this case. In *Davis v. Grant*, 532 F.3d 132 (2d Cir. 2008), the Second Circuit affirmed the denial of a habeas corpus petition after a state court defendant "was removed from the courtroom for disruptive conduct with no standby counsel appointed to represent him in his absence," 532 F.3d at 139. This situation continued when three prosecution witnesses testified and were not cross-examined by anyone. Thereafter, the defendant returned to the courtroom and did cross-examine three other witnesses who appeared in the case.

In this case, Petitioner Clark left the courtroom and there was "no standby counsel appointed to represent [her] in [her] absence" This situation continued *during the presentation of the prosecution's entire case.*

Examining this Court's decisions in *Illinois v. Allen*, 397 U.S. 337 (1970), *Faretta v. California*, 422 U.S. 806 (1975) and *McKastle v. Wiggins*, 465 U.S. 168 (1984), the Second Circuit in the *Davis* case found that the state courts which had affirmed the conviction did not violate clearly established law as declared by this Court. In the course of examining these issues, the Second Circuit noted that "more guidance from the Supreme Court would be helpful" in situations of this kind The appeal court explained: that "were we considering the issue *de novo*," it would conclude that

> the trial court was constitutionally required to appoint standby counsel for Davis during his involuntary absence from the courtroom . . . But we cannot conclude that the state court decisions [denying relief] were unreasonable applications of Supreme Court precedent-especially in light of *Clark* [*v. Perez*, 510 F.3d 382 (2d Cir. 2008) and [*United States v.*] *Torres*, 140 F.3d. 392 (2d Cir. 1998)]. We note, however, that the balance between a defendant's right to self-representation and the need to "ensur[e] that evidence admitted against [him] is reliable and subject to ... rigorous adversarial testing" is a delicate matter. *See Maryland v. Craig*, 497 U.S. 836, 846.... (1990). Frankly, more guidance from the Supreme Court would be helpful.

532 F.3d at 140.

It reiterated the need for more guidance from this Court later in its opinion. First, it noted that:

> That this is an area of law in need of further clarification is evident from the diametrically opposed positions taken by Davis and the government in this case. *Id.* at 149.

After describing the diametrically opposite views of the parties with respect to the requirements of the Sixth Amendment, the court concluded:

> We believe that the contrasting arguments of the parties in this case, as well as the divergence of thought between courts that have previously considered the issue, *indicate that this is an area in which further guidance from the Supreme Court would be useful.* 532 F.3d at 150.

We believe that the grant of certiorari in this case would supply the additional guidance noted by the Second Circuit.

Furthermore, as described below, language in this Court's recent decision in *Indiana v. Edwarsds*, 128 S.Ct. 2379 (June 19, 2008) (also decided after the filing of the Petition in this case) emphasizes the need to examine the issues raised in this case.

II. PROCEDURAL BACKGROUND

As noted in the Petition for Certiorari, ("Pet."), Petitioner Clark insisted on representing herself in a notorious robbery and murder case in a New York state court trial in 1983. The crimes were perpetrated by a group of radicals in 1981. As part of her "political" defense, she insisted on representing herself (so she could proclaim her political program in the course of the trial) and then walked out of the courtroom when the prosecution put on its case. After being sentenced to three consecutive terms of twenty-five years to life, she refused to take any appeal and made no effort to challenge her conviction until 2002 when she filed a motion for post-conviction relief in state court. After the state courts denied her request for relief, she filed a writ of habeas corpus in federal court in 2005. The district court granted relief, holding that the failure to appeal was "justified" since Petitioner did not have counsel, none had been appointed for her and without counsel, it was clear she was not prepared to take any steps to perfect an appeal (Pet. App. 109-110). The district court also held that there was substantial compliance with the New York procedural rules "given the particular circumstances of her case," namely the lack of counsel. (App.111-12).

> During the prosecutor's opening statement and during the government's entire direct case against defendants, which spanned at least seven trial days, *no one* was present

> in the courtroom to represent Clark's interests. Clark was without assistance of counsel for her defense, in clear abrogation of her Sixth Amendment right to counsel. Indeed, these facts demonstrate the very reason that Clark's waiver of her right to counsel, even if sufficient *ab initio,* could not be irrevocable -- the rationale lies in the judiciary's "'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" [citing *Wheat v. United States*, 486 U.S. 153, 160 (1988).] The proceedings at issue, with no one sitting at the defense table during the prosecution's entire case, would have appeared unfair to many people with knowledge of the constitutional right to counsel or a respect for our adversarial system of justice. Pet. App. 120

The Second Circuit reversed that decision, finding that Petitioner had procedurally defaulted and that, in any event, her absence from the courtroom was voluntary. Pet. 23-24, App. A. Petitioner then filed a motion for rehearing which was denied. Petitioner then filed the current timely Petition for Certiorari, on June 5, 2008.

III. THE SUBSEQUENT DECISION IN DAVIS v. GRANT

On July 8, 2008, following the filing of the current Petition, the Second Circuit issued its decision in *Davis v. Grant*, 532 F.3d 132 (2d Cir. 2008). In the *Davis* case, the defendant was accused on stealing a livery cab and then driving the cab into a police car that was chasing him, seriously injuring two officers. He was tried for assault, reckless endangerment and larceny. At his trial, he rejected two successive court-appointed attorneys and decided to appear *pro se*, with his last counsel acting as a legal adviser. When trial commenced, Davis began to act in a disruptive manner, insulting and arguing with the state court judge, Harold Rothwax. Davis was then removed from the courtroom. *Id.*.

Davis promised the judge to behave himself, and he was allowed to return. He then complained aloud about his attorney's inadequate preparation, asked for new counsel (which request was denied) and told the judge that he was going to talk directly to the jury. He was removed again. One prosecution witness testified in Davis' absence and was not cross-examined by anyone. Davis was allowed to return again and started creaming racial epithets. He was again removed from the courtroom and two other prosecution witnesses testified in Davis' absence without cross-examination. Davis was allowed to return again and cross-examined the remaining three witnesses. The court offered him the transcripts

of the witnesses who had testified when he was absent. *Id.* at 137-38. At the end of the trial, "Davis moved for a mistrial on the ground that he was denied the right to confront those witnesses. The court denied the motion, stating that '[t]he situation you found yourself in was one entirely of your own making.'" *Id.* at 138.

Davis called no witnesses of his own and summed up to the jury. He was found guilty on all counts.

The state appeal court affirmed the convictions, finding that he "was not deprived of his rights to confrontation or counsel; he alone was responsible for the manner in which the trial was conducted." *Id.* at 138. Davis then filed a writ of habeas corpus, which was denied, the district court finding that "petitioner [was] the direct cause of all the constitutional errors he now claims." *Id.*. at 139.

The Second Circuit affirmed. It noted that the state courts had decided the case on the legal merits and thus habeas corpus could be granted only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d). It discussed this Court's previous decisions in *Allen, Faretta* and *McKastle.*

> Because the Supreme Court has neither directly considered the question of law at

> issue nor ruled on a case with materially indistinguishable facts, the question here is reduced to whether the state court's failure to appoint standby counsel to represent Davis when he was involuntarily removed from the courtroom for disruptive conduct was an objectively unreasonable application of, or failure to extend, a legal principle clearly established by the Supreme Court in *Allen, Faretta*, and *McKaskle*. *Id.* at 141.

Thus the Second Circuit concluded that the state court's refusal to grant relief was not "objectively unreasonable." 532 F.3d at 140.

IV. ADDITIONAL REASONS FOR GRANTING THE WRIT

The Decisions in the *Clark* Case and in *Davis v. Grant* Show the Confusion That Exists in Weighing the Right of Self-representation Against the Need for Vigorous Testing of a Prosecution's Case, Thus Necessitating the Grant of Certiorari

In the course of its decision in Davis, the Second Circuit court acknowledged that it certainly was preferable to appoint standby counsel when a defendant has forfeited his right to appear *pro se*.

> Thus, *Allen* and *Faretta* make clear that a judge *may* use willingness and ability to abide by courtroom protocol as

> prerequisites for accepting a defendant's waiver of his right to counsel, and *may* appoint standby counsel to represent a defendant who has forfeited his right to appear *pro se.* The question before us, however, is whether a judge *must* follow these procedures. *Id.* at 143.

The Court concluded that appointing standby counsel is the preferred solution.

> We recognize that a trial-court judge confronted with a defendant who both continues to engage in serious misconduct and insists upon his right to represent himself is placed on the horns of a serious dilemma. The judge must choose between two imperfect solutions -- whether to allow the defendant to remain in the courtroom despite persistent misbehavior or to revoke the defendant's right to represent himself. Although we acknowledge the difficult position of the trial-court judge, a number of concerns favor requiring counsel to be appointed to represent a *pro se* defendant who is involuntarily removed from the courtroom. First, respect for all of a defendant's Constitutional rights, including his Fifth Amendment right to "due process of law," . . . and his Sixth Amendment rights to an "impartial jury" and "to be confronted with the witnesses against him," . . . support the appointment of standby counsel. An absent defendant cannot

> present witnesses on his behalf or cross-examine prosecution witnesses. An absent defendant cannot object to inadmissible evidence. An absent defendant cannot question potential jury members, present an opening statement, or offer a summation. In short, an absent defendant can protect neither his constitutionally guaranteed trial rights nor his interest in the outcome of the proceeding. Appointing counsel to replace an absented defendant, however, goes a long way towards mitigating these concerns. *Id.* at 143.

The Court also acknowledged that "the government's 'independent interest' in ensuring that criminal trials are fair and accurate favors the appointment of replacement counsel." *Id.*. If no counsel is appointed to represent an absented pro se defendant, "there is a real danger that the ensuing lack of 'rigorous adversarial testing that is the norm of Anglo-American criminal proceedings,' [*Maryland v.*] *Craig,* 497 U.S. [836, 846 (1990)], will undermine the accuracy of the truth-determining process. *Id.*

Finally, the Second Circuit noted that the "judiciary's interest in ensuring that criminal proceedings 'appear fair to all who observe them' strongly favors the appointment of replacement counsel. *See Wheat* [*v. United States,* 486 U.S. 153, 160 (1988).] *We are hard-pressed to think of a circumstance more likely to make an observer*

question the fairness of a trial than the sight of an empty defense table. Id. at 144 (emphasis added).

That, of course, is precisely the situation in the *Clark* case since there was an empty defense table *during the presentation of the prosecution's entire case which took seven days.*

The Court in *Davis* then established a rule which would certainly have favored Petitioner in this case. "Ultimately, if we were reviewing the issue on a blank slate, we might be inclined to conclude that a defendant *must* be 'able and willing to abide by rules of procedure' in order to waive his right to counsel." *Id.* But in the *Davis* case, the court felt that it was obliged to determine whether the state court's decision was an "objectively unreasonable application of, or failure to extend, clearly established Supreme Court precedent." Applying that rule, it found that in light of its own precedents and the lack of a more direct precedent from this Court, it could not overturn the state court's decision on habeas corpus.

The Second Circuit concluded by noting the confusion that existed with respect to the situation before the Court when a *pro se* defendant refuses to follow proper procedure. It emphasized the need for this Court to lay down clear rules for courts to follow:

> *That this is an area of law in need of further clarification* is evident from the

> diametrically opposed positions taken by Davis and the government in this case. While Davis argues that his Sixth Amendment rights were violated by the trial judge's failure to appoint standby counsel to represent him during his absence from the courtroom, the government claims that respect for Davis's Sixth Amendment rights is precisely what justified the trial judge's decision *not* to make such an appointment. *Id.* at 149. (emphasis added)

The Second Circuit did not accept the government's position. It predicted that this Court would ultimately adopt the position taken by Clark in this case and adopted by the District Court, namely that however and whenever a *pro se* defendant is absent from the courtroom, counsel must be appointed.

> Once a defendant waives his right to represent himself, any right he has to control his own defense can be accommodated via counsel (as it is for all other represented defendants), and *both the rights of the accused and the public interest strongly favor the appointment of counsel.* In fact, we would not be surprised if -- notwithstanding this Court's decision in *Torres* and *Clark* -- *the Supreme Court decided to adopt a bright line rule requiring the appointment of replacement counsel when a pro se defendant is absented from the courtroom.* . . . We believe that the

> contrasting arguments of the parties in this case, as well as the divergence of thought between courts that have previously considered the issue, *indicate that this is an area in which further guidance from the Supreme Court would be useful.* Although we hold that the trial court's actions here did not run afoul of clearly established law as determined by the decisions of the Supreme Court, we do note that the Court's precedents demonstrate that it is both permissible and good practice for a trial court to require that appointed counsel represent a *pro se* defendant excluded from the courtroom.

Id. . at 149-150

This Court's recent decision in *Indiana v. Edwards* also underscores the importance of the issues raised in this case. Although the question raised in that case was the mental competence of the defendant seeking to represent himself, this Court noted the importance of justice satisfying the appearance of justice, which would not be satisfied by the lack of adequate representation no matter what its source. This Court focused on the "most basic of the Constitution's criminal law objectives, providing a fair trial. . . . Further, proceedings must not only be fair, they must 'appear fair to all who observe them.' *Wheat v. United States*, 486 U.S. 153, 160 . . . (1988). "128 S.Ct. at 2387

It must be noted that in the *Clark* case itself, there was no determination of the legal merits of the case by the state courts, and therefore there was no occasion to apply the deferential standard in Section 2254(d). The state court decided the issue on procedural grounds. As the Second Circuit held in *Clark*, "By its own terms, therefore, the Rockland County Supreme Court announced that it was not basing its judgment on the merits of Clark's federal claim, but on a state procedural bar," Pet. App. 26. 510 F.3d at 394. Thus the deferential standard that was applied in *Davis* simply does not apply here. The Second Circuit in *Clark* announced that it was examining the legal issues *de novo* as this Court would also be in a position to do. Pet. App. 26.

In view of the Second Circuit's request for further guidance, in view of the confusion surrounding this issue, and in view of the importance of the questions for the administration of justice, this Court should grant certiorari in the *Clark* case.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
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